MAJUMDER v. ATTORNEY-GENERAL OF SARAWAK

[F.C. (Harley Ag. C.J. (Borneo), Ismail Khan and Gill JJ.) September 9, 1966]

[Kuching — Federal Court Civil Appeal No. X8 of 1965]

Administrative Law — Declaration — Contract of employment — Designated officer — Inducement pay — Prerogative of Governor-in-Council — Declaration concerning persons not a party to the action.

Contract — Employment — Advertisement — "Invitation to treat".

The appellant had claimed three declarations in the High Court as follows:— (a) that he is a member of Her Majesty's Overseas Civil Service; (b) that he is eligible for designation as a designated officer within the meaning of the Schedule to the Overseas Service Ordinance; and (c) that it would be unlawful to refuse the plaintiff benefits such as inducement pay payable to a member of Her Majesty's Overseas Civil Service. The High Court ([1966] 1 M.L.J. 41) granted the second declaration and refused the third; the first declaration was not granted as it was held that there was no question in dispute. The appellant appealed against the court's refusal to grant declarations (a) and (c) and the respondent filed a cross appeal on the ground that the learned trial judge erred in law in granting the second declaration.

Held: (1) the learned trial judge was right in exercising his discretion in not making the first declaration to declare something not in dispute especially as the first declaration would not assist in determining the appellant's rights to extra pay, if he has any such rights;

(2) the appellant did not have a valid claim to inducement pay on the contract of employment or on the general orders and in any event the question of expatriation pay was a matter within the authority of the Governor-in-Council;

(3) the designation of an officer as a designated officer was a matter for the Secretary of State of the United Kingdom and as the United Kingdom Government was not a party to the action, the High Court was wrong in making the declaration that the appellant was a "designated officer."

Cases referred to:—

(1) *Cox* v. *Green* [1966] Ch. 216.

(2) *London Passenger Transport Board* v. *Moscrop* [1942] A.C. 332.

(3) *Thomas* v. *Attorney-General* [1936] 2 All E.R. 1325.

FEDERAL COURT.

T. O. Thomas for the appellant.

Tan Chiaw Thong, Attorney-General, Sarawak, in person.

Cur. Adv. Vult.

Harley Ag.C.J. (Borneo): The appellant claimed in the High Court three declarations. The first declaration was not granted because there was no question of fact in dispute. The court granted the second declaration and refused the third. The appellant has appealed against the court's refusal to grant declarations 1 and 3. The respondent has filed a cross-appeal on the ground that the learned trial judge erred in law in granting the second declaration.

The first declaration of court claimed by the appellant was that "he is and has always been a member of Her Majesty's Overseas Civil Service with effect from the first day of December 1958". To this the defence pleaded that this question "is a matter solely within the discretion of Her Majesty's Government and . . . is not a matter over which the Government of Sarawak has any power or control and that the first claim of the plaintiff is not justiciable in this Honourable Court and is not within its jurisdiction. The defendant will however regard the plaintiff for the purposes of these proceedings as if he had been enrolled in Her Majesty's Overseas Civil Service on the 1st day of December, 1958." As to this first declaration claimed, I will at once say that in any event the learned trial judge's discretion cannot have been exercised wrongly if he refused to declare something not in dispute. Moreover, the first declaration would not assist in determining the appellant's rights to extra pay, that is if he has any such rights. (See *Cox* v. *Green* (1)).

The second declaration of court claimed by the appellant was that he "is eligible for designation as a 'designated officer' within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No. 15 of 1961)". To this, paragraph 16 of the defence replies, ". . . . . designation is a matter wholly within the competence and discretion of one of Her Majesty's principal Secretaries of State and is not within the competence of the Sarawak Government. The defendant will further contend that under section 1 of the Overseas Service Act 1961 the plaintiff cannot be designated under the Overseas Service (Sarawak) Agreement 1961 without the consent of the United Kingdom Treasury; and the defendant will further object that the Overseas Service (Sarawak) Agreement, 1961, is an agreement made between the Sarawak Government and Her Majesty's Government in the United Kingdom to which the plaintiff is not a party, and that for this reason the issue of designation under the said agreement is not justiciable in any proceedings in this Honourable Court."

The third and last declaration of court claimed by the appellant was "that it would be unlawful to refuse to the plaintiff (appellant) benefits such as inducement pay." It may be noted in passing that the phrase "benefits such as inducement pay" gives an impression of loose phraseology. One asks oneself at once whether, for instance, subsistence allowances are benefits "such as inducement pay." However, to this claim the defence in paragraph 17 was: "The defendant will contend that the third claim of the plaintiff is vague and based on a false premise and is not sustainable . . . . and denies that the documents referred to in the statement of claim create any legally enforceable obligation upon the Government of Sarawak." Also in answer to the third claim it was pleaded in

paragraph 15 that "in respect of his claim to entitlement to inducement pay the plaintiff is, by the terms of his appointment, bound to accept as final the decision of the Governor in Council in accordance with General Order 192 and that that course is still open to the plaintiff."

The claims are founded on contract. As for the part played in the contract by the British Government, this will be commented on later in the judgment. What really interests the appellant is the figure for his pay and allowances. The contract was introduced to the appellant by an advertisement. The advertisement stated a medical officer was required in Sarawak for general medical duties and the advertisement set out the salary scale. The passage in the advertisement to which the decision of the court is drawn by the appellant reads as follows:

> "In addition expatriation pay (pensionable) is payable varying from £252 to £336 a year, education allowance of £140 a year for up to two children between ages of 15 & 17 educated outside Sarawak, and a child allowance of 7½% of basic salary . . . . Free passages provided in both directions for officer, wife and up to three children under 18 years of age. Income tax at low local rates. Tour of service 30 to 36 months."

Taking the advertisement by itself for what it is worth — and its worth will be discussed later — does it imply that the appointment carries extra pay regardless of entitlement? Ground 3 of the memorandum of appeal states that "the appellant was applying for employment in an office which had been stated in the advertisement *without any words of qualification* to attract 'expatriation pay', in addition to salary, on a pensionable basis." Does the appellant seriously ask the court to find that expatriation pay was to be payable even to candidates who were not expatriates? To put a similar question in another form, could a candidate claim "family allowances" regardless of the fact that he had no family? The appellant urges that the word "expatriate" should be interpreted in its dictionary sense. In that sense, an expatriate is one who is banished or withdraws from his own country. An Englishman living in England is not an expatriate. Was the advertisement addressed to him? It is true that he would be an expatriate if he went to Sarawak. Is a citizen of Sarawak living in Sarawak an expatriate? Is such a citizen an expatriate when he lives in London? Even at the advertisement stage, and certainly later on, it becomes impossible to give any meaning to the terms "expatriate" and "expatriation pay" unless one refers to the context in which such terms are used. In other words, one is almost forced to the conclusion from the start that the word "expatriate" has a particular technical meaning and that its definition may be found in some Government Regulations or Orders. In so far as one can define legally expatriation or nationality, the appellant was not an expatriate. (See Earl *Jowitt's* "Dictionary of English Law," p. 764). At one stage the appellant himself pleaded that he "was never informed that his nationality . . . . had anything to do with terms and conditions of his service." (Paragraph 12 of statement of claim). How is this to be reconciled with the appellant's claim that he was entitled to classification as an expatriate?

Next let us consider the subsequent steps to completion of the contract. On the 2nd of May, 1958, the appellant was provisionally selected for appointment as medical officer, Sarawak, and was informed by the Colonial Office: "a formal offer of appointment will be sent to you as early as possible." On the 12th of June, 1958, the Colonial Office did offer an appointment "on the conditions set out in this letter and in the enclosed memorandum." The following passages are quoted from that letter of 12th June, 1958:—

> "The salary scale of the appointment is at the rate of $870 a month for the first year; $930 a month for the second year, rising by annual increments of $30 a month to $1,050 a month; then $1,085 a month rising by annual increments of $35 a month to $1,260 a month; then $1,300 a month rising by annual increments of $40 a month to $1,420 a month. There is an efficiency bar at $1,260 a month.
>
> In view of your professional experience and qualifications you would enter the salary scale at $1,155 a month."

At this point one would have thought that it would be abundantly clear to a man of average intelligence that he was entering the salary scale at a point above the minimum because of his "professional experience and qualifications." The evidence of the appellant himself was: "I thought inducement pay was included because the salary scale starts at $930 while I got $1,155."

To continue the quotations from this letter of 12th June, 1958, attention should be drawn to the following passages:

> "In addition to basic salary, allowances are payable at the rates shown in the memorandum.
>
> 4. If you are prepared to accept the appointment on these conditions you should inform the United Kingdom High Commissioner in Calcutta."

The letter also promised an "outfit allowance of £60 as a means of assistance towards the purchase of essential tropical kit."

The offer was that the appellant would receive allowances payable at the rates shown in the memorandum. The appellant said in evidence that up to August 1961 he thought that expatriation pay was included in his salary. During the period of negotiations there is no evidence that the appellant ever made any enquiries as to expatriation pay or as to the amount payable. The allowances to which appellant was entitled were set out in the memorandum attached to the letter of 12th June, 1958. The memorandum promised education allowance, child allowance and outfit allowance (£60). The appellant

picked on this promise of outfit allowance and on the fact that it was indeed paid to him as an argument that he must have been selected as an expatriate or induced officer. Ther is no suggestion that the term "induced officer" was known to the appellant at the time of entering into the contract. However, there is a General Order (No. 47) — and General Orders will be referred to again later on — which lays down that "outfit allowance *shall* be payable to induced officers." Clearly it does not follow, if a man is paid outfit allowance, that therefore he is an induced officer.

The memorandum forming part of the offer to the appellant also laid down general conditions of service: "An officer is subject to the General Orders of the Government in which he is serving, and to the Colonial Regulations for the time being in force in so far as the same are applicable." It is to be observed that neither the letter of 12th June, 1958, nor the memorandum attached to it made any explicit offer of, or gave any figure for, expatriation pay. It is also to be noted that the offer of employment made the offeree subject to General Orders. It is hardly conceivable that the appellant would have been refused permission to read General Orders if he had asked to see them. He has claimed that he would not be bound by General Orders when he was ignorant of their terms. Since 1st August, 1957, General Order 192 excluded from entitlement to inducement (expatriation) pay those habitually resident in India. This appellant had given an address in India as his permanent address. In paragraph 5 of the defence it was pleaded "that the plaintiff was at all material times habitually resident in India." To this, paragraph 6 of the reply stated that even if this was true, it was irrelevant.

Attention has already been drawn to the fact that the memorandum gave details of certain allowances but made no mention of expatriation pay. Now, if we are to believe the statement of the Chief Secretary, Sarawak, contained in a letter dated 31st January, 1962, mention of expatriation pay was a deliberate omission from the offer and contract with the appellant. In this letter it is stated that Sarawak General Order 192 excluded India for the purpose of inducement pay as from August 1957 and therefore "the clause about inducement pay was excluded in your terms and conditions of service." It may be unwise to assume that whenever expatriation pay was payable, a clause to that effect was invariably included under the heading "Allowances." We have, however, the evidence of one witness, a Mr. Murthy who was a forest conservator in Sarawak and came originally from India. He signed the contract for service in Sarawak in 1955 or 1956 (i.e. before August 1957). He said in evidence, "It was specifically stated that I would get expatriation pay. Reason: because I was recruited in U.K. I am an Indian."

In the record before this court there is no letter included of any date between 12th June, 1958, and 6th December, 1958, but the offer of 12th June was presumably accepted without qualification by the appellant in a letter dated 10th October, 1958. It is not explained why the letter of acceptance dated 10th October — produced in the court below — is omitted from the appeal record. The statement of claim was somewhat evasive as to acceptance of an offer of appointment. Paragraph 11 of the statement of claim *in vacuo* refers to "the offer of appointment." It is not stated in the statement of claim whether "the offer of appointment" was the letter of 12th June, 1958. In any event the appellant accepted the offer. The learned judge in the court below was therefore right in his finding that "Plaintiff replied on 10th October, 1958, accepting the offer under the terms and conditions set out in the letter dated 12th June, 1958, and in the memorandum."

A formal offer was made by the Chief Secretary of Sarawak to the appellant in a letter dated 6th December, 1958. The letter offered pay, allowances and other privilges, but certainly made no mention of expatriation pay. It stated that the appellant would "enter the salary scale at $1,155 a month" and that he must make a declaration of secrecy in accordance with General Order 570. As I have already observed, the appellant apparently never asked to see General Orders, nor did he put any questions about expatriation pay. In answer to this last offer of 6th December, the appellant undertook in a letter dated 11th December, 1958, "to accept such appointment subject to rules and regulations of Her Majesty's Overseas Civil Service now in force, and to any alterations or amendments thereto which may be made from time to time." It must be stressed that the acceptance was made specifically subject not only to regulations then in force but also to all alterations or amendments which might be made. How in the face of this can appellant argue that General Order 192 could not apply to him? It is to be noted also that the appellant on 16th September, 1961, petitioned the Governor-in-Council that he should be granted inducement pay with retrospective effect and in this petition he stated, "The grounds of my appeal are: (1) On the date of my appointment . . . I did satisfy the requirements of . . . General Order No. 192." When it suits him, the appellant is prepared to rely on General Order 192, although at other times he denies that General Orders apply to him. This petition was answered by the letter quoted above from the Chief Secretary, Sarawak, dated 31st January, 1962.

Now, either General Order 192 applies to the appellant's contract or it does not. If it does

apply to him, he would be excluded from any claim for inducement pay because he was habitually resident in India. This General Order also sets out "(ii) if at any time any question arises whether any officer or class of officers is eligible for inducement pay, the decision of the Governor-in-Council shall be final." Therefore, if General Order 192 does apply to appellant, his eligibility for inducement pay is for the decision of the Governor-in-Council. On the other hand, if General Orders, including General Order 192, do not apply to the appellant, his claim to inducement pay must depend on his contract, and on the wording of the official letters already quoted and of the appellant's own replies.

It may be helpful at this stage to see how the learned judge in the court below dealt with the claim for "benefits such as inducement pay." The following is an extract from his judgment:

"Plaintiff stated that until August, 1961, he was all the time under the impression that his salary included inducement pay. When he realised that it was not so he submitted a petition dated 19th August, 1961, to the Governor-in-Council asking for inducement pay retrospectively from the date of his first appointment. The petition appeared to have been sent to the Secretary of State who agreed with the Government of Sarawak that plaintiff was not entitled to inducement pay. Thus the Chief Secretary replied to the petition that plaintiff's claim for inducement pay could not be admitted. There is no clear evidence whether this petition did go to the Governor-in-Council as it should have gone for under the Sarawak Government General Orders the decision of the Governor-in-Council is deemed to be final."

As already stated, General Order 192 lays down that some officers are entitled to inducement pay, others not. As regards the appellant's entitlement, if the Governor-in-Council has given a decision, it must be final. If, however, as it would appear, he has not yet decided the petition, then it is not for this court to anticipate the decision. The appellant's argument that other officers of Her Majesty's Overseas Civil Service get inducement pay can carry no weight, nor does the fact that the appellant was for a short period listed (mistakenly) in the official staff list as an induced officer. The learned trial judge undoubtedly took the right view with regard to the evidential value of the staff list.

Clearly the appellant cannot claim inducement pay by reference to General Orders. He must stand or fall, as already stated, by the terms of his contract as contained in the letters. The learned trial judge very properly held that the advertisement could not be incorporated into the contract and was in fact merely "an invitation to treat."

I now propose to deal with the second declaration claimed, and granted by the court. The claim was that the appellant "is eligible for designation as a designated officer." In order to give any meaning to the term "designated officer," one must turn to the Sarawak Overseas Service Ordinance No. 15 of 1961, in which we find that "designated officer" means "an officer designated as such by a Secretary of State." In the context, "Secretary of State" means "one of Her Majesty's Principal Secretaries of State in the United Kingdom." It is plain on the face of it that no person can claim to be a designated officer unless he has been so designated by Her Majesty's Secretary of State. It is true that the appellant does not claim that he is a designated officer but that he is "eligible for designation as a designated officer." This phrasing again is perhaps deliberately loose and "vague" as pleaded in the defence. One cannot normally come to court and claim, as it were in the abstract, that one is "eligible" for the office of, say, Prime Minister or Archbishop. It cannot have any practical effect to rule that the appellant *could* be designated *if* the Secretary of State chose to designate him. Moreover, to be a designated officer, one must also be an expatriate officer. Mention of expatriate or induced officers in this context seems to imply officers who are entitled to expatriation pay or inducement pay. If we are to find that the appellant is an expatriate officer, we are concerned once more with the question of inducement pay. In fact ground 16 of the appeal claims that designation as a designated officer would entitle the appellant to inducement pay. That question of inducement pay brings us back in a circle to the contract and/or to General Order 192. It has already been stated that this court cannot rule on any question giving rise to claims for inducement pay without impinging on the authority of the Governor-in-Council. The authority of the Governor-in-Council is concerned with both the second and the third declarations because entitlement to inducement pay is tied in to both declarations.

Finally, as regards the appellant's eligibility for designation, it is outside the discretion of the court to grant such a declaration for reasons germanely set out in the cross-appeal as follows:

"(1) That the learned trial judge erred in law in making a declaration affecting a person not a party to the action, namely, Her Majesty's Government of Great Britain and Northern Ireland who had an interest in the subject matter of the declaration.

(2) That the learned trial judge should have refused to make the second declaration as in the circumstances such a declaration was not effectual and enforceable."

It seems to me that these grounds of appeal are incontestable. The courts should not make declarations which concern persons interested but not joined as parties (*London Passenger Transport Board* v. *Moscrop* [2] and *Thomas* v. *Attorney-General* [3]). It is impossible for the defence through the Attorney-General of Sarawak to represent, still less to bind, Her Majesty's Government in Britain. I am not unmindful of of the fact that by article 48 of the Constitution

of the State of Sarawak the Government of Sarawak may inherit certain rights, liabilities and obligations of Her Majesty. The point in the instant case is that no rights, liabilities or obligations concerning "designation" can arise until a designated officer has been designated as such by a Secretary of State and on this point there is express agreement between the two Governments contained in the Overseas Service Ordinance No. 15 of 1961.

In the event the appeal is dismissed and the cross appeal is allowed. The appellant must pay the costs of the appeal and of the court below.

Ismail Khan and **Gill JJ.** concurred.

Appeal dismissed. Cross-appeal allowed.

LIM WHONG IN v. HOCK CHEONG NEWSPAPER TRANSPORT CO. LTD. & ORS.

[F.C. (Barakbah L.P., Ismail Khan and Ali JJ.) September 19, 1966]

[J.B. — Federal Court Civil Appeal No. X34 of 1966]

Damages — Injury to arm — Pain and suffering as a result of — Refusing amputation — Trend of awards.

This was an appeal against the quantum of general damages awarded to the plaintiff as a result of an accident in which he sustained injury to his left arm. The plaintiff had refused to have his arm amputated and as a result had to undergo a lot of pain and trouble for treatment. According to the medical evidence he could do any work not requiring use of the left arm. He was awarded $15,000 as general damages. It was argued that the damages awarded in this case were not "in line with a discernable trend or pattern of awards in similar cases".

Held: in the circumstances of this case the amount awarded for general damages was reasonable and not out of line with the discernable trend or pattern of awards in similar cases.

"Damages for injuries" include damages for loss of future earnings.

Cases referred to:—

(1) *Phua Tin Hang* v. *Teo Soh Choo* [1964] M.L.J. cx.

(2) *Jag Singh* v. *Toong Fong Omnibus Co.* [1964] M.L.J. 463.

FEDERAL COURT.

Denis Murphy for the appellant.

Morris Edgar for the 1st respondent.

Cur. Adv. Vult.

Barakbah L.P.: The plaintiff claimed damages against the defendants for injury to his left arm as a result of a head-on collision between motor van number M. 8709 and motor-car number SB. 5187. The High Court in Johore Bahru awarded $4,640 as special damages and $15,000 as general damages to the plaintiff who now appeals to this court on the quantum of general damages.

The appellant was being paid $120 per month and employed by the first respondent as a driver of the motor van. At the time of the accident he was a passenger in the said van travelling from Johore Bahru to Pontian and the second respondent was the driver.

According to P.W.1, Mr. William Fung, the appellant had the following injuries:—

(1) Severe and deep abrasions and lacerated wounds invclving the whole of the left arm from the shoulder to the tips of the fingers. There were marked sepsis and necrosis of the tissues.

(2) Fracture of the neck of the left humerus.

(3) Compound fracture of the left radius and ulna.

The doctors appeared to have advised the appellant to have his arm amputated from about the middle of the upper arm but he refused to do this. According to Mr. Fung and Dr. Lee the appellant on leaving hospital on 5th February, 1962, had been treated by a Chinese herbalist. On 12th February, 1962, he went to the General Hospital, Malacca. He remained in the hospital until 30th April, 1962, when he was discharged but continued as an out-patient. On 3rd July, 1962 and 28th August, 1962, he was treated as an out-patient in the General Hospital, Singapore, and on 28th September, 1962, he was re-admitted into a ward for plastic surgery and underwent a series of operations transferring the skin and tissues of the abdomen to the left arm. He was discharged on 30th October, 1962, and on 12th November, 1962, he was re-admitted again for further plastic surgery. He was discharged on 17th November, 1962, and visited the hospital on 26th November, 1962, 7th December, 1962, 18th December, 1962, and 28th December, 1962, as an out-patient. He then returned to Malacca and was seen again in the out-patients' department on 5th February, 1963 and 12th February, 1963, when he was given a certificate for light duties. On 31st May, 1963, he was re-admitted for further plastic surgery and was discharged on 7th June, 1963. He was re-admitted on 21st June, 1963, for replacement of bone loss from the forearm and was discharged on 31st August, 1963. He was re-admitted again on 23rd October, 1963, and remained in hospital until 5th November, 1963, when he was discharged but continued as an out-patient. He was seen as an out-patient on two occasions, namely on 18th November, 1963 and 10th December, 1963. Mr. Fung saw him finally on 14th December, 1963, and on examination of the left shoulder found that there was limitation of movement in the left shoulder joint and flexion was 90° and